Supreme Court, U.S.
FILED
JUL 6 1993
OFFICE OF THE CLERK

No. 92-1806

In The

Supreme Court of the United States

October Term, 1992

PETITION OF CHARLES L. MEYER,

Petitioner,

JOHN LELSZ, JR., *ET AL.*,

Respondents.

v.

JOHN J. KAVANAGH, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS JOHN LELSZ, JR. AND ADVOCACY, INC.

DAVID FERLEGER
37 S. 20th Street, Suite 601
Philadelphia, PA 19103
(215) 567-2828

Counsel for Respondents
John Lelsz, Jr., *et al.*

GARTH CORBETT
Advocacy, Inc.
7800 Shoal Creek
Suite 171-E
Austin, TX 78757

Counsel for Respondents
Advocacy, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Where all the multiple parties to an 18 year old systemic class action have either settled their differences or decided not to seek further review, does an individual non-party parent of a class member have standing to seek review of the settlement approval?

2. Does the unpublished unanimous Court of Appeals decision conflict with any decision by the Supreme Court?

3. Does the Court of Appeals decision conflict with any decision of any Court of Appeals?

LIST OF ALL PARTIES

Named Plaintiffs

John Lelsz, Jr., by and through his next friends, John Lelsz, Sr. and Ruth Lelsz.

Jean Gibson, by and through her next friend, Beryl Gibson.

Stoyan Sephus, by and through his next friend, Roxy Sephus.

Michael Huffman.

Plaintiff Class

All persons who resided at Austin, Denton or Fort Worth State Schools on or after November 27, 1974 and all persons who have appeared on the Registry for State School Placement since 1981.

Defendants

The Texas Commissioner of Mental Health and Mental Retardation, Dennis Jones, the Deputy Commissioner for Mental Retardation Services, Jaylon Fincannon, all members of the Texas Board of Mental Health Retardation, and the Superintendents of Austin, Denton and Fort Worth State Schools.

Intervenors

Advocacy, Inc.

Parent Association for the Retarded of Texas

LIST OF ALL PARTIES – Continued

Petitioner

Charles L. Meyer (not a party in the District Court)[1]

---

[1] Although not a party in the District Court, Meyer, who is the father of one of the small number of class members who objected to the settlement, filed an appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit's affirmance of the settlement approval is the subject of Meyer's certiorari petition. No party in the court below has joined this certiorari request.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 5

I. PETITIONER DOES NOT HAVE STANDING TO SEEK REVIEW OF THE SETTLEMENT APPROVAL BECAUSE HE IS A NON-PARTY PARENT OF A CLASS MEMBER AND THE CLASS HAS JOINED ALL OTHER PARTIES IN APPROVING THE SETTLEMENT 5

II. THE UNPUBLISHED UNANIMOUS COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANY SUPREME COURT DECISION 7

III. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANY DECISION OF ANY COURT OF APPEALS 9

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) 7

Croyden Assoc. v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992) 6

Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) 6

In re VMS Ltd. Partnership Sec. Litig., 976 F.2d 362 (7th Cir. 1992) 5

Jenkins v. State of Missouri, 967 F.2d 1245 (8th Cir. 1982) 6

Lelsz v. Kavanagh, 783 F.Supp. 286 (N.D. Tex. 1991). 2, 3, 4

Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987) 3

Lelsz v. Kavanagh, 673 F.Supp. 828 (N.D. Tex. 1987) 3

Marino v. Ortiz, 484 U.S. 301 (1988) 5

Moore v. Jas. H. Matthews & Co., 682 F.2d 830 (9th Cir. 1982) 9

Rufo v. Inmates of Suffolk Jail, 112 S. Ct. 748 (1992) 8

Shores v. Sklar, 844 F.2d 1485 (11th Cir. 1988) 6

Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980) 8

Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988) 5

Federal Court Rules

28 U.S.C. F.R.Civ. P. 23 6

No. 92-1806

In The

Supreme Court of the United States

October Term, 1992

PETITION OF CHARLES L. MEYER,

Petitioner.

JOHN LELSZ, JR., *ET AL.*,

Respondents.

v.

JOHN J. KAVANAGH, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS JOHN LELSZ, JR. AND ADVOCACY, INC.

STATEMENT OF JURISDICTION

This Court does not have jurisdiction over this case. Meyer was not a party in District Court, did not intervene for purposes of appeal to the Court of Appeals, and is not properly before this Court. The petition presents no justiciable Article III case or controversy. See discussion below at Section I.

STATEMENT OF THE CASE

All parties and intervenors settled their differences after 18 years of litigation. Raising irrelevant issues that were not addressed by either of the courts below, the father of one class member seeks review by certiorari even though he has no standing, and even though there is no conflict with any Circuit or any decision by the Supreme Court.

Filed in 1974, this civil rights class action challenged the adequacy of care at certain Texas state schools for people with retardation, alleged their inherent harmfulness, and requested that they be ordered closed and replaced with community services. *Lelsz v. Kavanagh*, 783 F. Supp. 286, 287 (N.D. Tex. 1991). Although school closures were among the requests, the class action's objective was to improve and ensure constitutional guarantees to adequate care. The class now has 5,683 members who are, or were since 1974, residents at Fort Worth, Austin or Denton state schools.

In 1983, on the eve of the trial, Plaintiffs and Defendants came to an agreement called the Resolution and Settlement ("R&S"). The R&S established a general right to community services and to institutional improvements. After the R&S was signed, two parties joined as intervenors with regard to implementation of the judgment: Advocacy, Inc.,[2] the federally funded agency mandated to represent the interests of people with developmental disabilities, which generally supported the Plaintiff class,

---

[2] The Plaintiff class and Advocacy Inc. have filed this Brief in Opposition.

and Parent Association for the Retarded of Texas ("PART"), which generally supported the Defendants.

The Fifth Circuit reversed later orders for community placements. *Lelsz v. Kavanagh,* 807 F.2d 1243 (5th Cir. 1987). The Defendants' failure to comply with other portions of the settlement led to the State Defendants being held in contempt of court. *Lelsz v. Kavanagh,* 673 F. Supp. 828, 831 (N.D. Tex. 1987). Shortly thereafter, the parties signed the second settlement, the Implementation Agreement ("IA"), to delineate compliance standards under the R&S.

Although it opposed the R&S in 1983, PART signed the IA whose primary purpose was not to amend or replace, but rather clarify the R&S. *Id.* at 876.

Since 1987, the State and the Plaintiffs have had numerous disagreements over compliance with the IA. A third agreement, the Settlement Agreement ("SA"), was reached August 9, 1991 and approved by the District Court.

The history of the case is recited in detail in the settlement approval decision which is at issue here. That opinion also examines the settlement and the objections submitted in response to it. *See Lelsz v. Kavanagh,* 783 F. Supp. 286 (N.D. Tex. 1991). Before the court approved the IA, a fairness hearing had been held at which the court received and considered objections by a small portion of the class, as well as extensive evidence in support of the settlement. Approximately 370 objections were received from persons on behalf of class members, which represented about 6.5 percent of the class. Thus, nearly 93.5

percent of the 5,683 class members did not object to the SA.

The Petitioner, Charles L. Meyer had not participated in this litigation for the first 18 years of its pendency, and his first action was his *pro se* objection to the SA. Meyer presented no evidence or argument with regard to his objection; he did not make his presence known or speak in court at the settlement approval hearing. Significantly, except for his unusual argument that the 1983 settlement must forever remain in force, Meyer's objections to the settlement echoed those made by PART and its witnesses, all of which objections were considered by the District Court.

The District Court found that the SA would provide a number of important benefits to the class. Among the benefits, the SA would provide the Plaintiffs with two of the central goals from the original complaint: closure of state schools and creation of improved, more intimate community placements. *Lelsz*, 783 F. Supp. at 290.

Other benefits include independent neglect and abuse review, a simpler appeals process for placement decisions, and maintenance of quality standards in the community. *Id.* As the District Court pointed out, "the State had learned to analyze the quality of its programs and services more critically." *Id.* at 295. Furthermore, those shortcomings that remain in the state schools are almost certain not to improve further under the IA. *Id.* at 296.

Meyer, along with PART, appealed to the Fifth Circuit. The appeals were consolidated, and the judgment

approving the settlement was affirmed, with the Court of Appeals finding no abuse of discretion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner does not have standing to seek review of the settlement approval because he is a non-party parent of a class member and the class has joined all other parties in approving the settlement.

Petitioner Charles L. Meyer had not participated in this litigation for the first 18 years of its pendency. His first action was his *pro se* objection to the 1991 settlement, one objection among the very small number received by the trial court. He did not present any testimony or evidence, or even speak on the record at the settlement approval hearing. In addition, Meyer did not move to intervene for the purposes of appeal.

The rule is "well settled" that objectors to a settlement who are not named class representatives may not appeal approval of the settlement, unless they are parties to the original suit or have intervened for the purpose of appeal. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).

There is no conflict among the circuits on this settled rule. The Fifth, Seventh, Eighth, and Eleventh Circuits all agree. *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988) (nonnamed members of certified plaintiff class lack standing to challenge consent decree that district court has ordered approving settlement between all named parties); *In re VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362 (7th Cir. 1992) (allowing unnamed class member to

directly appeal post-settlement order implementing settlement agreement would wholly thwart the purpose of class action); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992) (unnamed class member could not appeal even though it objected to settlement agreement, where it failed to intervene); *Jenkins v. State of Missouri*, 967 F.2d 1245 (8th Cir. 1992) (school desegregation settlement included property tax raise; nonparty non-intervenor property owners had no standing to appeal); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988) (unnamed class member has no standing to appeal final judgment when named plaintiff does not appeal); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987) (inmate who was nonnamed class member does not have standing to appeal final judgment rendered in an inmate class action).[3]

Meyer is a parent of a nonnamed class member who did not move to intervene at any point in the case's litigation. Of the parties, only PART appealed to the Fifth Circuit, but PART did not file a writ of certiorari after the Fifth Circuit held that the District Court did not abuse its discretion in approving the settlement.

---

[3] In *Guthrie*, the court held that there are three reasons why a nonnamed class member does not have standing to appeal a final judgment binding on their class members: such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure; class members who disagree with a course of class action have available adequate procedures through which their individual interests can be protected; and class actions could become unmanageable and non-productive if each member could individually decided to appeal. *Id.* at 628.

Meyer was not a party in District Court, did not intervene for purposes of appeal to the Court of Appeals, and is not properly before this Court. The petition presents no justiciable Article III case or controversy. Meyer has no standing to seek certiorari in this Court; he had no standing in the Court below.[4]

II. The unpublished unanimous court of appeals decision does not conflict with any Supreme Court decision.

Although Meyer cites *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988)[5] in the title of his argument, he does not cite *Christianson* or any other Supreme Court case regarding the law of the case conflict in his argument. Meyer only cites cases which explain this Court's power to grant writs of certiorari and the lower courts' duty to obey the superior courts.

Meyer is challenging the third and final settlement agreement which was signed and approved by all named

---

[4] Here, the Fifth Circuit had no occasion to address the standing issue since Meyer's *pro se* appeal raised issues entirely without merit; to the extent he had general objections to the settlement, the Circuit addressed them in finding that the District Court had not abused its discretion in its detailed and considered decision approving the parties' decision to end the litigation.

[5] In *Christianson*, the law of the case issue was whether the Federal or Seventh Circuit had first decided the issue over jurisdiction. *Id.* at 817.

parties.[6] In an agreement objected by only 6.5 percent of the class, Meyer is making an unprecedented argument that the courts do not have authority to alter a consent decree. The law of the case principle, on which Meyer relies, does not preclude the Fifth Circuit from approving the SA agreed upon by all the named parties.

The law of the case doctrine promotes finality and efficiency in the adjudication of a case, and as a result, precludes a court from reexamining an issue previously decided. *Van Gemert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980). The law of the case doctrine does not pertain to revision of consent decrees. A District Court is permitted to exercise flexibility in considering requests to modify consent decrees when it is no longer equitable for a judgment to have prospective application. *Rufo v. Inmates of Suffolk Jail*, 112 S. Ct. 748, 760 (1992). Although the courts have accepted previous agreements between the named parties, the law of the case doctrine would not treat those agreements as dispositive.

Also, this conflict argument was never addressed by the Fifth Circuit. Hence, there is no conflict with any Supreme Court decision.

---

[6] The three signatories for the SA are the Plaintiff class, Defendants, and Intervenor Advocacy Inc. Although PART was opposed to the SA, it did not file a writ of certiorari.

III. The court of appeals decision does not conflict with any decision of any court of appeals.

Although Meyer cites numerous Court of Appeal cases which restate the law of the case doctrine, these cases, however, do not pertain to consent decrees approved by all named parties. Instead, they concern situations where, for example, a lower court decides to not follow the higher court after remand. *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830 (9th Cir. 1982).

Moreover, because this conflict argument was never addressed by the Fifth Circuit, there is no conflict with any decision of any Court of Appeals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID FERLEGER
37 S. 20th Street
Suite 601
Philadelphia, PA 19103
(215) 567-2828

Attorney for Respondents
John Lelsz, Jr., et al.

GARTH A. CORBETT
Advocacy, Inc.
7800 Shoal Creek Boulevard
Suite 171-E
Austin, TX 78757-1024
(512) 454-4816

Attorney for Advocacy, Inc.